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IN THE COURT OF APPEALS OF INDIANA

ALBERT GREEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0510-CR-608
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49F09-0504-FD-60491

August 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Albert Green (Green) appeals from the sentence imposed by the trial court pursuant to his guilty plea to theft as a class D felony.

We affirm.

ISSUE

1. Whether the sentence was appropriate in light of the nature and circumstances of the crime.

2. Whether the trial court abused its discretion when it sentenced Green.

FACTS

On April 9, 2005, Green was arrested and charged with theft as a class D felony for allegedly stealing auto light bulbs worth $42.47. On September 6, 2005, Green pleaded guilty to the charge. The plea agreement between Green and the State provided that in exchange for his plea of guilty, the sentence would be "open with a cap of 365 days on the initial executed portion of the sentence," and he would not receive alternative misdemeanor sentencing. (App. 24). A pre-sentence investigation report (PSI) was ordered by the trial court. On September 20, 2005, the trial court conducted a sentencing hearing. At that hearing, Green testified that he was remorseful for the crime he committed. After receiving evidence and hearing the arguments of counsel, the trial court sentenced Green as follows:

> The Court finds mitigating factors in the Defendant has taken responsibility for his behavior by his acceptance of his responsibility and plea. The Court finds as aggravating circumstances the Defendant does have prior criminal history, murder to commit a felony back in November of 1972, possession of cocaine, July of 1988, [b]attery, November of 2000, resisting law enforcement, October of 2001. This would be the Defendant's fifth felony conviction. The Court finds aggravating circumstances outweigh mitigating circumstances.

> Sentences the Defendant to two (2) years. Out of those two (2) years he has one hundred and eighty (180) days executed, that will be at the Department of Corrections [sic], the rest of the time will be suspended. He will be placed on probation. I'm not going to put any specific condition on him other than substance abuse evaluation and treatment if necessary.

(Tr. 22-23).

Green appeals the sentence imposed.

DECISION

1. Inappropriate sentence.

The State argues that Green waived his right to challenge the appropriateness of his sentence when he entered into a plea agreement that limited the amount of executed time. In support of its position, the State offers the cases of Mast v. State, 824 N.E.2d 429 (Ind. Ct. App. 2005), and Wilkie v. State, 813 N.E.2d 794 (Ind. Ct. App. 2004), trans. denied. However, in Childress v. State and Carroll v. State, 848 N.E.2d 1073, 1079 (Ind. 2006)(consolidated cases), our Supreme Court squarely rejected the State's position and expressly disapproves the rationale of Mast and Wilkie. See Childress/Carroll, 848 N.E.2d at 1079.

In Childress/Carroll, supra both defendants challenged the appropriateness of their sentences. Childress entered into a written plea agreement, wherein for exchange for his guilty plea to B felony possession of methamphetamine, the State would dismiss other pending charges against him. The plea also provided that Childress would be sentenced to 6 years, with the State and defense free to argue whether the sentence would be executed. The trial court accepted the plea agreement and sentenced Childress to a sentence of 6 years,

executed with the Department of Correction. Childress appealed arguing the sentence was inappropriate because he was a good candidate for probation.

Carroll was charged with multiple felony drug and weapon related charges. He entered into a written plea agreement with the State wherein he agreed to plead guilty to a class B felony dealing in methamphetamine charge; carrying a handgun without a license as a class C felony; resisting law enforcement as a class D felony; and the State agreed to dismiss the remaining charges. The plea agreement provided for a maximum sentencing cap of 12 years, with both sides free to argue for a specific sentence within that range. The trial court imposed an executed sentence totaling 11½ years on all of the charges. Carroll appealed, arguing that the sentence was inappropriate because the trial court ignored significant mitigating factors.

This court issued unpublished opinions in both Childress and Carroll concluding that both appellants had waived their right to have their sentences reviewed for appropriateness. Specifically, we found that by voluntarily entering into a plea agreement with a sentencing range, a defendant necessarily agrees that the resulting sentence is appropriate.

In Childress/Carroll, our Supreme Court explained that "where a plea agreement sets forth a sentencing cap or a sentencing range, the court must still exercise some discretion in determining the sentence it will impose. That is, the trial court must nonetheless decide whether, in the case of a sentencing cap, to impose the maximum sentenced allowed by the cap or to impose a lesser sentence." Id. at 1078. "As a consequence, on appeal the defendant 'is entitled to contest the merits of a trial court's sentencing discretion.'" Id. at 1078-1079

(quoting Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996)); see also Hole v. State, No. 48S02-0607-CR-272, 2006 WL 2076759 at *2 (Ind. July 27, 2006); Rivera v. State, No. 57S03-0607-CR-273, 2006 WL 2076757 at *2 (Ind. July 27, 2006).

In the matter before us, Green's plea agreement capped the executed time at 365 days. Following the holding of Childress/Carroll, we find that the trial court did exercise discretion in the sentence imposed herein; therefore, Green is entitled to appeal his sentence. We reject the State's waiver argument and review the issue on its merits.

Green argues the sentence imposed was inappropriate because of the nature and circumstances of the crime, i.e. the value of the items he stole was under $50 and Green's criminal history was remote in time. We disagree.

In general, sentencing determinations are within the trial court's discretion. Bonds v. State, 729 N.E.2d 1002, 1004 (Ind. 2000). This court will not revise a sentence authorized by statute unless it is inappropriate in light of the nature of the offense and the character of the offender, as authorized by Indiana Constitution Art. VII, Section 4 and Indiana Appellate Rule 7(B). Pinkston v. State, 836 N.E.2d 453, 458 (Ind. Ct. App. 2005), trans. denied. However, we exercise great restraint in reviewing and revising sentences and recognize the special expertise of the trial bench in making sentencing decisions. Id.

The trial court when sentencing Green found that

> mitigating factors in the Defendant has taken responsibility for his behavior by his acceptance of his responsibility and plea. The Court finds as aggravating circumstances the Defendant does have prior criminal history, murder to commit a felony back in November of 1972, possession of cocaine, July of 1988, [b]attery, November of 2000, resisting law enforcement, October of 2001. This would be the Defendant's fifth felony conviction. The Court finds

aggravating circumstances outweigh mitigating circumstances.

(Tr. 22-23). In light of Green's criminal history spanning three decades, with one of the convictions being for felony murder, we do not find that the sentence imposed by the trial court to be inappropriate.

2. Abuse of discretion

Next, Green argues the trial court abused its discretion at sentencing because (1) it failed to consider Green's remorse as a mitigating factor, and (2) Green's criminal history was not a sufficient aggravating factor. We disagree with Green.

We reiterate that sentencing decisions are within the trial court's discretion and will be reversed only for an abuse of discretion. Comer v. State, 839 N.E.2d 721, 725 (Ind. Ct. App. 2005), trans. denied. In order to reduce or increase a presumptive sentence,[1] the trial court must consider aggravating and mitigating factors. I.C. § 35-38-1-7.1. The presumptive sentence for a D felony is one year and a half. Ind. Code §35-50-2-7. Aggravating factors can add a year and a half to the presumptive sentence, and mitigating factors can reduce said sentence to six months. Id.

A trial court's sentencing statement must (1) identify significant aggravating or mitigating circumstances, (2) state the specific reason why each circumstance is aggravating or mitigating, and (3) demonstrate that the factors have been weighed to determine that the aggravators outweigh the mitigators. Comer, 839 N.E.2d at 725. The trial court must

[1] Green committed the offense on April 9, 2005, before Indiana Code section 35-50-2-1.3 (2005) was amended to provide for an "advisory" rather than "presumptive" sentence. Because another panel of this

consider all evidence of mitigating circumstances offered by the defendant; however, the finding of a mitigating factor rests within the trial court's discretion. Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002). We will not find an abuse of discretion where a defendant's proffered mitigating factor is "highly disputable in nature, weight, or significance." Id. In contrast, a trial court failing "to find mitigating circumstances clearly supported by the record may imply that the sentencing court improperly overlooked them. Id. However, "the court is obligated neither to credit mitigating circumstances in the same manner as would the defendant, nor to explain why he or she has chosen not to find mitigating circumstances." Id. Even one properly found aggravating factor is sufficient to enhance a sentence. Riehle v. State, 823 N.E.2d 287, 300 (Ind. Ct. App. 2005), trans. denied.

At sentencing, Green testified as follows:

> Q: Okay. Do you have any remorse about this event?
>
> A: Yes, I do. I feel very bad about what I done. I feel I disrespected not only myself but my God that I believe in and also the people who own the store and the [S]tate.
>
> Q: Did you apologize to them when you were taken into custody?
>
> A: Yes, I did.

(Tr. 17-18). As a reviewing court we do not reweigh the evidence and the trial court was not obligated to find that Green's proffered testimony of his being remorsefulness as being a significant mitigator was clearly supported by the record such that the same was overlooked by the trial court. As a result, we do not find that the trial court erred when it did not give

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court recently held that the change constituted a substantive rather than procedural change we will not apply it

significant or the same weight to Green's proffered mitigator as he believed it should have been given.

The trial court in its sentencing statement balanced the aggravating factors with the mitigating factors and concluded that the aggravating factors outweighed the mitigating factors. The trial court found as a mitigating factor that, by entering into the plea agreement, Green had accepted responsibility for what he had done. However, the trial court identified as an aggravating factor that Green "does have prior criminal history, murder to commit a felony back in November of 1972, possession of cocaine, July of 1988, [b]attery, November of 2000, resisting law enforcement, October of 2001. This would be the Defendant's fifth felony conviction." (Tr. 22-23).

The sentencing order clearly supports the enhanced sentence imposed upon Green. Therefore we do not find that the trial court abused its discretion.

We affirm.

RILEY, J., and VAIDIK, J., concur.

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retroactively. Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied.